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No. 99-944

In the Supreme Court of the United States

HELEN CHENOWETH, MEMBER OF CONGRESS, ET AL.,
PETITIONERS

v.

WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE
UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
ANDREW MERGEN
ETHAN G. SHENKMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13PP

QUESTION PRESENTED

Whether individual Members of Congress have standing to challenge a presidential Executive Order on the ground that the Order exceeded the President's statutory authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 181 F.3d 112. The opinion of the district court (Pet. App. 16-28) is reported at 997 F. Supp. 2d 36.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1999. A petition for rehearing was denied on September 3, 1999 (Pet. App. 29). The petition for a writ of certiorari was filed on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are four Members of the United States House of Representatives. They brought suit in federal district court, challenging the validity of Executive Order No. (E.O.) 13,061, 3 C.F.R. 221 (1998) (Pet. App. 30-38), which established the President's American Heritage Rivers Initiative (AHRI).[1]

The AHRI is a non-regulatory initiative designed "to support community-based efforts to preserve, protect, and restore [designated] rivers and their communities." E.O. 13,061, § 1(f) (Pet. App. 31). Local communities are invited to nominate rivers or river segments to be designated as American Heritage Rivers, based on their natural, historic, cultural, or economic values or other unique characteristics. E.O. 13,061, § 2 (Pet. App. 33-35). For each designated river, the Executive Order states that federal agencies, "to the extent permitted by law and consistent with their missions and resources, shall coordinate Federal plans, functions, programs, and resources" to assist local communities in their river protection or economic revitalization efforts. E.O. 13,061, § 1(b) (Pet. App. 30). Agencies may use federal facilities to support the goals of the AHRI, but only "to the extent permitted by law and consistent with the agencies' missions and resources." E.O. 13,061, § 1(j) (Pet. App. 32).

2. Petitioners filed suit in the United States District Court for the District of Columbia, seeking a

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[1] After the President announced his intention to establish the AHRI, three of the petitioners introduced a bill in the House of Representatives that would have "terminate[d] further development and implementation of the" initiative. See Pet. App. 2-3 (citing H.R. 1842, 105th Cong., 1st Sess. (1997)). That bill never came to a vote. *Ibid.*

declaration that E.O. 13,061 is illegal and an injunction against its implementation.[2] Pet. App. 3. Petitioners alleged that the President lacked statutory authority to establish the AHRI. They claimed that E.O. 13,061 therefore violated the separation of powers doctrine; the Commerce Clause (Art. I, § 8, Cl. 3); the Property Clause (Art. IV, § 3, Cl. 2); the Spending Clause (Art. I, § 9, Cl. 7); the Tenth Amendment; the Anti-Deficiency Act, 31 U.S.C. 1301 *et seq.*; the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*; and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* Pet App. 17.

The district court concluded that petitioners lacked standing to sue and accordingly dismissed the complaint. Pet. App. 16-28. The court found that "[t]he quality of plaintiffs' injury * * * is too abstract and not sufficiently specific to support a finding of standing." *Id.* at 23. It explained that under District of Columbia Circuit precedent, "an injury like the one claimed by [petitioners], perpetrated by the Executive branch and unrelated to a specific piece of legislation, is not sufficiently specific to support standing." *Id.* at 24.

3. The court of appeals affirmed. Pet. App. 1-15.

a. The court of appeals held (Pet. App. 7-10) that petitioners' standing arguments were foreclosed by *Raines* v. *Byrd*, 521 U.S. 811, 830 (1997), in which this Court concluded that individual Members of Congress did not have standing to bring a constitutional chal-

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[2] When petitioners' complaint was filed in December 1997 (see Pet. 4), local communities had nominated 126 rivers or river segments. See 63 Fed. Reg. 25,479 (1998). No rivers were selected, however, until July 30, 1998 (well after the district court had issued its decision in this case, see Pet. App. 16), when the President named 14 American Heritage Rivers from among those nominated. See 63 Fed. Reg. 41,949 (1998).

lenge to the Line Item Veto Act. The court explained that "the injury [petitioners] allegedly suffered when the President issued Executive Order 13,061—a dilution of their authority as legislators—is * * * identical to the injury the Court in *Raines* deprecated as 'widely dispersed' and 'abstract.'" Pet. App. 8-9. The court also stated that petitioners' suit would not have been allowed to go forward even under the District of Columbia Circuit's pre-*Raines* precedents. Under those precedents, the court of appeals concluded, petitioners' alleged injury would have been "found * * * sufficient to satisfy the standing requirement," but the complaint would nevertheless have been dismissed in the court's exercise of "equitable discretion." *Id.* at 10 (citing *Moore* v. *United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985)).

b. Judge Tatel filed a separate opinion concurring in the judgment. Pet. App. 13-15. Judge Tatel agreed with the majority that petitioners lack standing to sue. *Id.* at 13. Rather than address the impact of *Raines* on existing circuit precedent, however, Judge Tatel would have based his decision on *United Presbyterian Church in the U.S.A.* v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), which held that a Member of Congress lacked standing to contest the legality of an Executive Order. See Pet. App. 14.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 14) that the court of appeals' "opinion permitting the President to enact a law contrary to the process set forth in the Constitution

jeopardizes [the] liberties" protected by principles of separation of powers. The question presented in this Court, however, is whether petitioners have standing to sue. This Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). The Court's decision in *Raines* v. *Byrd*, 521 U.S. 811 (1997), makes clear that the same principle applies where a Member of Congress invokes the jurisdiction of the federal courts. See *id.* at 830 (holding that the plaintiffs' challenge to the Line Item Veto Act should be dismissed because the plaintiff Members of Congress "do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing").

2. Petitioners' reliance (Pet. 17-18, 22-25) on *Coleman* v. *Miller*, 307 U.S. 433 (1939), is misplaced. In *Coleman*, 20 (out of 40) state senators brought a mandamus action in the Kansas Supreme Court. *Id.* at 436. The gravamen of their suit was that the State's Lieutenant Governor, as presiding officer of the Senate, had improperly cast a tie-breaking vote in support of ratification of a proposed amendment to the United States Constitution. *Id.* at 435-436. The state supreme court entertained the suit on the merits, concluded that the Lieutenant Governor was authorized to cast the deciding vote, and held on that basis that the proposed amendment had been properly ratified by the Kansas Legislature. *Id.* at 437. The plaintiffs then sought review in this Court, which held that "at least the

twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446; see *Raines*, 521 U.S. at 822-823 (summarizing *Coleman*).

In *Raines*, this Court held that "*Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S. at 823 (citation omitted). The plaintiffs in *Raines*, by contrast, could "not allege[] that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id.* at 824. While acknowledging that the Line Item Veto Act might in some sense reduce the "effectiveness" of the plaintiffs' votes on future appropriations bills (see *id.* at 825), the Court explained that "[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step." *Id.* at 826.

Like the plaintiffs in *Raines* (and unlike the plaintiffs in *Coleman*), petitioners cannot claim that they comprised all or part of a legislative majority that would have enacted (or defeated) a specific legislative measure but for the action of the President. Executive Order No. 13,061 does nothing to prevent Members of

Congress from debating or voting on any bill they wish, and it does not purport to alter the legal effect of their votes.[3] The injury alleged here is nothing more than the "wholly abstract" diminution of legislative power that can be asserted whenever the Executive Branch is alleged to have acted in violation of applicable statutes. *Raines*, 521 U.S. at 829. To recognize standing in this case would vest individual Members of Congress with unfettered access to the courts to challenge the validity of any Executive Branch action they believe to be unlawful—a result severely at odds with the separation of powers principles that underlie Article III standing requirements.[4]

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[3] Petitioners argue (Pet. 18, 24 & n.19) that they cannot overturn E.O. 13,061 through a majority vote in each House because the President can be expected to veto any such bill. They contend (Pet. 18) that the prospect of a presidential veto distinguishes this case from *Raines*, where the Court observed that "a majority of Senators and Congressmen" could vote to pass or reject appropriations bills, to repeal the Line Item Veto Act, or to exempt a particular appropriations bill (or provision thereof) from the Act's coverage. 521 U.S. at 824. In fact, however, the Court in *Raines* specifically noted the possibility of a presidential veto. See *id.* at 825 n.9.

[4] Petitioners seek to characterize E.O. 13,061 as an incursion on their legislative powers, arguing that "the Members were not allowed to vote for or against enactment of the AHRI prior to President Clinton's unilateral enactment of the AHRI." Pet. 18; see also Pet. 19-20 ("despite the requirement of the Constitution that only Congress may enact laws, President Clinton enacted the AHRI unilaterally by Executive Order 13061"). As this Court has recognized, however, "[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I." *INS* v. *Chadha*, 462 U.S. 919, 954 (1983). Any Executive Branch conduct alleged to violate statutory requirements or proscriptions could, on petitioner's theory of standing, be recharacterized as an implied amendment or repeal of an enacted law.

3. Petitioners contend (Pet. 25-27) that the court of appeals improperly abandoned prior circuit precedent based on a misunderstanding of this Court's decision in *Raines*. An intra-circuit conflict typically provides no basis for invoking this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, all three members of the panel in this case agreed that petitioners' suit would be foreclosed even under the principles of legislative standing developed in the District of Columbia Circuit before *Raines* was decided. See Pet. App. 10 (majority states that petitioners would have been found to have standing, but that their suit would have been dismissed on the ground of equitable discretion); *id.* at 13-15 (Judge Tatel concludes that petitioners would lack standing under prior circuit law).

As Judge Tatel explained (Pet. App. 14), the District of Columbia Circuit case most closely on point is *United Presbyterian Church in the U.S.A.* v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (Scalia, J.). In that case, an individual Member of Congress (along with other plaintiffs) filed suit to challenge an Executive Order governing foreign intelligence and counterintelligence activities of the Executive Branch. *Id.* at 1377. The plaintiff Member "assert[ed] that the Executive Order confer[red] authority on the intelligence agencies beyond that authorized by Congress, and indeed that the order violate[d] express limitations imposed by Congress." *Id.* at 1381. He contended on that basis "that his powers as a legislator ha[d] been diminished, constituting sufficient injury to give him standing." *Ibid.* The court of appeals rejected that claim, holding that the plaintiff Member lacked standing because "his complaint [wa]s 'a generalized grievance about the conduct of government.'" *Id.* at 1382 (quoting *Moore* v. *United States House of Representatives*, 733 F.2d at 952).

Indeed, petitioners cite no decision of any court suggesting that Executive Branch conduct violative of statutory restrictions, or in excess of statutory authority, inflicts a judicially cognizable injury upon an individual legislator.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
ANDREW MERGEN
ETHAN G. SHENKMAN
Attorneys

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